THE JUDICIAL POWER: THE LAWYER'S DUTY TO PROTECT.

TO HAVE created a Judicial Department by dividing all governmental activities into three parts, without assigning a definite, exclusive power to it, is a conclusion in arms against reason and common sense. It is an accusation that the most reckless, dissatisfied and unpatriotic would not bring against the wise members of the Federal Constitutional Convention of 1787. Whatever division of opinion there is then, concerns itself with the extent and manner of use of that power. To the discussion of this element of government the attention of thoughtful readers is respectfully directed with the aim at the normal and organic development of the courts now being attempted by earnest judges and lawyers.

If the mental processes and experience of wise and respected men have influenced the prudent in the past it is not wholly illogical to believe that there yet remains in this advanced age a disposition to profit by the experience and wisdom of others worthy of emulation. With that apology and as an introduction there may be profitably introduced the arguments of Rufus Choate of Massachusetts; the conversion of Chief Justice Gibson of Pennsylvania, after twenty years' experience, and the opinion of President James Keith of the Supreme Court of Virginia, who represented the best traditions of the "Mother of States", after three decades on the Bench. These men, one and all, occupied a place in the hearts of their countrymen as well as a secure fame in their memory.

RUFUS CHOATE'S ANALYSIS OF GOVERNMENTAL POWERS.

Mr. Choate, in his ripe old age, when free from political ambition and with his heart full of pride and love for his State, delivered the memorable and last address before the Massachusetts Constitutional Convention of 1853,[1] and said:

[1] THE DEBATES IN THE CONSTITUTIONAL CONVENTION 1853, published by the State of Massachusetts.

"I do not know how far it is needful to take notice of an objection by the gentleman from Fall River (Mr. Hooper), and less or more by others, to the existing system, on the ground that it is monarchical, or anti-republican, or somehow inconsistent with our general theories of liberty. He has dwelt a good deal on it; he says we might just as well appoint a governor or a representative for life, on good behavior, as a judge; that it is fatally incompatible with our frame of government, and the great principles on which it reposes. One word to this. It seems to me that such an argument forgets that our political system, while it is purely and intensely republican, within all theories, aims to accomplish a two-fold object, to-wit: *liberty and security*. To accomplish this two-fold object we have established a two-fold set of institutions and instrumentalities; some of them designed to develop and give utterance to one; some of them designed to provide permanently and constantly for the other; some of them designed to bring out the popular will in its utmost intensity of utterance; some of them designed to secure life, and liberty, and character, and happiness and property, and equal and exact justice, against all will and against all power. These institutions and instrumentalities in their immediate mechanism and workings are as distinct and diverse, one from the other, as they are in their offices, and in their ends. But each one is the more perfect for the separation; and the aggregate result is our own Massachusetts.

"Thus in the law-making department, and in the whole department of elections to office of those who make and those who execute the law, you give the utmost assistance to the expression of liberty. You give the choice to the people. You make it an annual choice; you give it to the majority; you make, moreover, a free press. You privilege debate; you give freedom to worship God according only to the dic tates of the individual conscience. These are the mansions of liberty; here are her arms, and here her chariot. In these institutions we provide for her; we testify our devotion to her; we show forth how good and how gracious she is—what energies she kindles; what happiness she scatters; what virtues, what talents wait on her—vivifying every atom, living in every nerve, beating in every pulsation.

"But to the end that one man, that the majority, may not deprive any of life, liberty, property, the opportunity of seeking happiness, there are institutions of security. There is a Constitution to control the government. There is a separa-

tion of departments of government. There is a judiciary to interpret and administer the laws, that every man may find his security therein. And in constituting these provisions for security, you have regard mainly to the specific and separate objects which they have in view. You may very fitly appoint a few judges only. You may very fitly so appoint them as to secure learning, impartiality, the love and confidence of the State; because thus best they will accomplish the sole ends for which they are created at all.

"* * * You assign to liberty her place, her stage, her emotions, her ceremonies; you assign to law and justice theirs. The State, the emotions, the visible presence of liberty, are in the mass meeting; the procession by torchlight; at the polls; in the halls of legislation; in the voices of the Press; in the freedom of political speech; in the energy, intelligence and hope, which pervades the mass; in the silent, unreturning tide of progression. But there is another apartment, smaller, humbler, more quiet, down in the basement story of our capitol—appropriated to where there is no high nor low, no strong nor weak; where will is nothing, and power is nothing, and numbers are nothing—and all are equal, and all secure, before the law."

Chief Justice Gibson's Conversion.

Chief Justice Gibson in 1825 wrote the dissenting opinion in *Eaken* v. *Raub*,[2] severely arraigning the judicial power. It is most helpful to observe that he took pains to nullify that opinion twenty years later in brief but equally forcible language in *Norris* v. *Clymer*,[3] decided in 1845. The conversion of this distinguished and thoughtful jurist must bear with material influence upon the matured as well as the undeveloped mind of this day. One will instantly recall that he lived and strove through the John Marshall period of government—through a time of steady and rapid growth of the government when it was taking on its form, and the country its power and substance; during the period when the lifeless parchment called the Constitution was being developed into the sinews that happily bind a group of sovereign States into a mighty nation, instead of a vacillating confederation, and untenanted forests and plains were being

[2] 12 Serg. & Rawls 330.

[3] 2 Pa. St. 277, 281.

fashioned into farms, factory sites and cities. And one will not be so ungrateful as to be unmindful that it was the opinion of the courts in the exercise of the judicial power, John Marshall in the lead, that achieved the body of law that made these marvels possible. Emerging from the struggles and discouragements of this political, industrial and commercial growth and strife, the venerable and grey Chief Justice Gibson might have stood like a Moses looking into the Promised Land of a fully developed republic, that he would never enjoy, but that had been made possible by his own wise conduct and in spite of the adverse convictions of his youth and inexperience. In the midst of an argument being made by F. W. Hubbell, he interrupted to remark, "I have changed that opinion for two reasons. The late Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case." [4] After reading these remarks every lawyer ought to study *Eaken* v. *Raub*,[5] as a measure of the distance Chief Justice Gibson had to go in his conversion. It evidences the necessity for the judicial power but, in that confession, he left behind him a lasting testimonial of the manhood and fearlessness and wisdom that the great State of Pennsylvania recognized, rewarded and remembers. A man who has made no mistakes has not likely done anything else.

JUDGE JAMES KEITH OF VIRGINIA.

It was as late as 1899 that a Virginia Legislature forsook the promptings of an inherited traditional policy; forgot the doctrines and philosophy of their ancestors and honored predecessors; renounced the principles upon which Virginia's fame rests secure and undertook to curtail the judicial power. As in the days of John Marshall, there arose a defender in the person of James Keith possessing and intelligently conscious of a militant sense of the duty and courage to keep the Old Dominion in the true faith of judcial power. Said he: [6]

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[4] Norris *v.* Clymer, *supra,* p. 281.
[5] *Supra.*
[6] Carter *v.* Com., 96 Va. 791, 811, 32 S. E. 780.

"In public apprehension, the Legislature is deemed in a peculiar sense the agent and representative of the people. It is true it constitutes the most numerous branch of the government and the brief terms for which its members are elected, and the fact that they are directly voted for by the people, give color to and encourage this opinion, but a moment's reflection should serve to dispel it. In our system of government all power and authority are derived from the people. They have seen fit by organic law to distribute the powers of government among three co-ordinate departments—the executive, the legislative, and the judicial. The Constitution of the State, which is the law to all, declares, in the 7th Section of the first Article, that the legislative, executive and judicial powers should be separate and distinct. This is a quotation from the Bill of Rights, an instrument which should never be mentioned save with the reverence due to the great charters of our liberties. Of such importance is this principle deemed that it is repeated, and constitutes a distinct article, which declares that the legislative, executive and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided. (Const'n. of Va., Art. II.) Whoever, therefore, belongs to either one of these great departments is an agent and servant of a common master; and each and all represent a part of the sovereignty of the State so long as they move within the appropriate spheres prescribed to them by the organic law. A court and the judge thereof, is as much an agent and servant of the people as any other officer of government, and he is bound by the duty and obligation which he owes to the Commonwealth to cherish, defend and transmit unimpaired to his successors, the office with which the Commonwealth has seen fit to honor him. A judge, therefore, in vindicating the dignity and authority of the court over which he presides is discharging a solemn duty owed in his official capacity, and is not engaged in a personal private controversy.

Views of Other State Courts.

Leaving aside for the moment the decisions of the Federal Supreme Court, but going to the State courts for inspiration, we find two other decisions coming from a wide geographical com-

pass that further define the inherent judicial power. They are *In re Shortridge*[7] from California and *State* v. *Morrell*[8] from Arkansas. With the assistance of the Trinity System and Rose's Notes the other authorities may be commanded. The Supreme Court of Arkansas said:

> "The Legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this Court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and State institutions, and a favorite theory in the government of the American people."

One citation from the Federal Supreme Court, with the assistance of Shepherd's Digest, will be sufficient to accentuate a helpful distinction as well as to demonstrate the point. In *United States* v. *Hudson*,[9] Mr. Justice Johnson said:

> "* * * Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the State is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far *our courts no doubt possess powers not immediately derived from statutes;* but all exercise of criminal jurisdiction in common law cases, we are of opinion, is not within their implied powers."

THE FEDERALIST ADVOCATED IT.

The doctrine is clearly defined in the 78th Article in the Federalist. Attention is directed to two excerpts:

> "* * * Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least

[7] 34 Pac. 227.
[8] 16 Ark. 384.
[9] 7 Cranch 32, 34, 3 L. Ed. 260.

> dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. * * * It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things to keep the latter within the limits assigned to their authority."

The articles in the Federalist were prepared and published in the pre-political days as part of the propaganda in favor of the adoption of the Constitution and at a time when all good men were striving as one; were thinking as one in the interest of a great American republic that existed then only in the vision of the patriots. These articles were prepared to show the merits of the Constitution as an argument to the voters. They are the strongest possible evidence. Moreover, Mr. Jefferson and Mr. Hamilton were in accord. The pens of Mr. Madison, Mr. Hamilton and Mr. Jay recorded messages that have been printed and bound in the same volume. Franklin and Wilson of Pennsylvania, Ellsworth of Connecticut and many others supported these sentiments. The noxious vapor of politics had not crept into the sacred chamber of patriotism and poisoned its pure air or stifled the processes of reason. Men thought what they said and felt what they thought. One may be pardoned the diversion to remark that there exist today many statesmen who could profit by their example. May not the Bench and Bar and the people also turn to the spirit and utterances of that period for inspiration and guidance?

PREDICTED LEGISLATIVE ENCROACHMENT HAS MATERIALIZED.

It is in order at this juncture to let the memory travel back to the Madison Papers and the arguments on the floor of the

Convention that the conviction may be straightened that the Constitution makers, after carefully distributing all power amongst three distinct departments, reluctantly and with serious forebodings left the Judicial Department at the mercy of the Legislative Department, lest future lawmakers fall into the poltical weakness of following the precedent of ancient examples and legislate the Judicial Department out of existence in such a slow and insidious manner that the passing would go unnoticed by contemporaneous citizenship. Thoroughly alarmed, Mr. Wilson of Pennsylvania, supported by Mr. Madison of Virginia, persistently but unsucessfully proposed a coalition between the Judicial and Executive Departments for mutual protection. One feels obliged to note that these were two of the strongest and most conservative minds in the Convention. The defeat of the proposal was influenced by the wise determination to keep separate the three departments and not from a lack of merit; for it is useful to emphasize, there pervaded the whole Convention a lively dread of the legislative usurpation that is being hurtfully demonstrated at this time. It should be known that legislation designed to improve the administration of justice, unanimously recommended by the American Bar Association and forty-six State Bar Associations, has been arbitrarily suppressed in the Senate Judiciary Committee for ten years, in spite of a persistent popular demand. Congress is gradually usurping the powers of the courts. It may be stated that the Congress and State Legislatures not only provide what the courts may do, which is proper, but they prescribe how they shall do it, which is nothing less than administering legislative justice instead of judicial justice. Both judges and lawyers are statutorily bound hand and foot in a narrow compass. They are not permitted to give to the State the benefit of their learning, wisdom, experience and patriotism. And, the most wicked of all results, the lawyers are forced to fight the judge instead of helping him and are sworn to take advantage of technicalities. This is not so in England where the judges and lawyers are allowed by Parliament to conduct the courts. It is hardly necessary to remind one that the power to direct the manner of doing a thing is the power to control the result. Mr. Madison in order to forestall this very tres-

pass by Congress argued for the coalition between the Executive and Judicial Departments, as follows: [10]

> "It would be useful to the Judiciary Department by giving it an addtional opportunity of defending itself against legislative encroachments. * * * If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength, either to the Executive or the Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended, *that, notwithstanding this coöperation* of the two departments, the legislature would still be an overmatch for them. *Experience in all the States had evidenced a powerful tendency in the legislature to absorb all power into its vortex.*"

AN INHERITED DUTY TO PROTECT THE JUDICIAL DEPARTMENT.

The student of the Madison Papers and of the views of the members of the Federal Constitutional Convention will conclude that, instead of an unwise coalition between the Executive and Judicial Departments as a mutual protection, these, thoughtful, farseeing and patriotic Founders, having faith in Americans and the descendants of those who dearly acquired their great government, depended upon the patriotism, the learning and understanding and the spirit of a great and noble people, yet unborn, to carry the spirit of 1776 and of the Convention of 1787 into the government of future years. They believed that their sentiment would be absorbed; their warnings regarded and a careful watch maintained. That splendid faith should prove an inspiration, aye, should make manifest a sacred duty and should create an unquenchable fire of enthusiasm in every son of America whether he be lawyer or layman. How well has this sacred duty been performed? That is a question that every judge, lawyer and law teacher must answer, for they and they alone must keep alive the spirit of the Federalist or write other arguments equally as cogent for the education of the coming generations. They stand as the only protectors of the courts and the judicial power. Unfortunately there are no George Masons in

[10] SCOTT, MADISON PAPERS, 399.

this day sending forth from the farm a Bill of Rights emblazoned with the glories of liberty or arguments in favor of its sacred doctrines. The farmer, manufacturer and merchant have left that patriotic task to those trained in the law and the science of government and they must rise to the occasion or sink to the depths of Milton's miserable pretenders to rights at the Bar. And they will deserve their fate!

Division of the Judicial Power.

From what has been cited and quoted the judicial power may be divided into a "Constitutional" and an "inherent" power. As to the former one may safely rely upon the Madison Papers, the convictions of Noah Webster and well-conceived judicial opinions. If no other judge had ever given definition and cogent reasons for the "inherent" judicial power, it would be safe and literature and history would be rich in the opinion of Judge Keith. It permanently marked a division of governmental power in Virginia, by which other courts well may profit, and upon which no unwise politician will likely have the termerity again to trespass in the Old Dominion.

Certain Assaults upon It Discussed.

Legal history does not show the inherent power of self-preservation of courts to have been asserted except against two assaults, although there are two others deserving attention, viz.: (1) The effort to take from the courts the power to punish for contempt and refer it to a jury; (2) The deprivation in the Federal Courts of the right to assist the jury by summing up the evidence and in a proper case instructing a verdict; (3) The deprivation of the control of the detail machinery of trials by the courts, through statutes in lieu of court-made rules; (4) The recall of judicial opinions.

As to the first, sufficient has been said even regarding so important a matter to provoke the interest and research of the reader. It is a simple subject and an outstanding one in the Federal Convention that contemporaneous ingenuity has sought to obscure with the fog of mystery. The second may be consid-

ered as controlled by *Capital Traction Company* v. *Hoff*.[11] That attack may be passed by as a dead issue. As to the third, the organized judges and lawyers are now conducting a militant campaign before Congress, strongly supported by the people, designed to set free the Supreme Court to prepare and substitute for the present statutory pleading and procedure a scientific system of simple rules for the regulation of the trial courts. As a model it will manifestly be adopted by the States. It may not come to pass this year on account of the opposition of certain reactionary Senators, but its achievement is as inevitable as fate. Every lawyer should interest in this bill the senators and congressmen of his acquaintance. The fourth may be brushed aside with the remark that the recall of judicial opinions was stillborn, regardless of the sympathy and support of a man of the consequence of Theodore Roosevelt. It was another occasion when the lawyers rose as one man in opposition to a noxious and wicked governmental exotic and evidences a duty well and promptly performed and a power therefore seemingly atrophied from nonuse in America.

Are the Prayers of the Founders Being Answered?

So it is seen that, if the spirits of Madison, Jefferson, Jay, Hamilton, Wilson, Franklin and that grand array of noble associates are looking down upon the American judges and lawyers of today, as one loves to believe they are, they are well pleased. The last decade has seen an energetic awakening amongst the judges and lawyers in the interest of the true spirit of the Constitution and the inherited duty to protect the judicial department that might be an answer to the fervent prayers of Madison and James Wilson and of Thomas Jefferson of 1776 and 1787. And this is true, regardless of the lamentable fact that a recent Virginia Governor refused to follow the recommendation of the organized lawyers in the selection of the personnel of judges. While that was a discouraging sign, his subsequent overwhelming repudiation at the polls fully vindicates the present optimism

[11] 174 U. S. 1, 6. See 3 Va. Law Rev. 275, for an argument prepared by the writer and successfully submitted to Congress in opposition to proposed hostile legislation. For same article see "Spirit of the Courts" p. 200.

and determined spirit. The lawyers have a well defined duty to perform. They will win and assure a sensible, speedy and economical administration of justice in America or they will surrender and lose further caste with a justly dissatisfied people who need them and who wish to respect them and follow them. The appeals, made at the San Francisco Bar Association Convention, ought to bestir every self-respecting, liberty-loving lawyer in America into a fresh determination to put this generation on record as understanding and desiring to follow the doctrines and wishes of the Founders of the great American Republic in protecting the Judicial Department from further trespass by the Legislative Department or from being actually "absorbed in its vortex".

Thomas W. Shelton.

NORFOLK, VA.